IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

WEDNESDAY, THE 21ST MARCH 2007 / 30TH PHALGUNA 1928

WP(C).No. 27586 of 2005(H)

PETITIONER:

ALAVIKUTTY @ BABU, P.W.D. CONTRACTOR,
THURAKKAL P.O., KONDOTTY VIA,
MALAPPURAM DISTRICT.

BY ADV. SRI.T.P.KELU NAMBIAR (SR.)
SRI.BABU JOSEPH KURUVATHAZHA
SRI. K.I. SAGEER IBRAHIM

RESPONDENTS:
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1. **STATE OF KERALA, REP. BY ITS**
   SECRETARY TO GOVERNMENT, DEPT. OF PUBLIC WORKS,
   GOVT. SECRETARIAT, THIRUVANANTHAPURAM.

2. **THE SUPERINTENDING ENGINEER,**
   P.W.D., NATIONAL HIGHWAY, NORTH DIVISION),
   KOZHIKODE-1.

3. **THE EXECUTIVE ENGINEER, P.W.D.,**
   (NATIONAL HIGHWAYT DIVISION), KOZHIKODE-1.

BY GOVERNMENT PLEADER SRI. P.A.SALIM

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 14/03/2007 ALONG WITH WPC.NO.10998 OF 2006, THE COURT ON 21/03/2007 DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: COPY OF THE COMPLETION CERTIFICATE NO.D2-3150/01 DTD. 29/03/2003 ISSUED BY THE 2ND RESPONDENT.

EXT.P2; COPY OF THE COMPLETION CERTIFICATE DTD. 6/07/2002 ISSUED BY THE 2ND RESPONDENT.

EXT.P3: COPY OF THE SCHEDULE OF WORK NAMELY IMPROVEMENTS OF RIDING QUALITY FROM Km 42/00 TO 55/00 OF NH 212 ISSUED BY THE 2ND RESPONDENT.

EXT.P4; COPY OF THE RELEVANT PROVISIONS OF MOST SPECIFICATIONS/ SRB.

EXT.P5: COPY OF THE SELECTION NOTICE NO.D4-1650/03 DTD. 15/01/2005 ISSUED BY THE 2ND RESPONDENT.

EXT.P6: COPY OF THE REPRESENTATION DTD. 21/05/2004 SUBMITTED BY THE PETITIONER BEFORE THE 3RD RESPONDENT.

EXT.P7: COPY OF THE REPRESENTATION DTD. 1/06/2004 SUBMITTED BY THE PETITIONER BEFORE THE 2ND RESPONDENT.

EXT.P8: COPY OF THE REPRESENTATION DTD. 31/08/2004 SUBMITTED BY THE PETITIONER BEFORE THE 3RD RESPONDENT.

EXT.P8(A): COPY OF THE LETTER NO.D3/1704/2003 DTD.1/01/2005 ISSUED BY THE 3RD RESPONDENT.

EXT.P8(B): COPY OF THE LETTER NO.D4/1650/03 DTD. 15/01/2005 ISSUED BY THE 2ND RESPONDENT.

EXT.P9; COPY OF THE REPRESENTATION DTD. 27/01/2005 SUBMITTED BY THE PETITIONER BEFORE THE 2ND AND 3RD RESPONDENTS.

EXT.P10: COPY OF THE ORDER NO.D4/1560/03 DTD. 29/07/2005 ISSUED BY THE 2ND RESPONDENT.

EXT.P11: COPY OF THE ORDER DTD. 27/09/2004 IN WP(C) NO.21081/2004 OF THIS HON'BLE COURT.

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EXT.P12: COPY OF THE JUDGMENT OF THIS HON'BLE COURT DTD. 25/08/2005 IN WP(C) NO.25304/2005.

EXT.P13: COPY OF THE ORDER NO.D4.1560/2003 DTD. 19/09/2005 ISSUED BY THE 2ND RESPONDENT.

EXT.P14: COPIES OF FEW PHOTOGRAPHS ESTABLISHING THE EXECUTION OF WORK BY THE PETITIONER IN THE PRESENCE OF THE CONCERNED AUTHORITIES.

EXT.P15: COPY OF ORDER DTD. 21/12/06 IN WP(C) NO.34434/2006 OF THIS HON'BLE COURT.

/TRUE COPY/

KSS

T.R. Ramachandran Nair, J.

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W.P.(C).NO.27586/2005 & 10998/2006

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Dated this the 21st day of March, 2007

JUDGMENT

The petitioner in these writ petitions assail the action of the respondents in directing him to remit an amount of Rs.77,61,699/- provisionally assessed as risk and cost amount and the subsequent action in removing his name from the approved list of contractors apparently for the non payment of the amount. The facts in short are the following:

2. Petitioner is a Government contractor, who is having valid registration under the Kerala P.W.D. Manual. The petitioner claims to have executed large number of works under the State P.W.D. and Central P.W.D. which according to him, have been completed in time. In the present writ petitions, the subject matter of the dispute concerns the work awarded to him in relation to the improvements of the riding quality from Km 42/00 to 55/00 of NH 212. Ext.P5 is the selection notice issued to the petitioner by the second respondent. It is averred in the writ petition that an agreement was executed by the petitioner with the second respondent on 11.3.2004.

3. The parties are at dispute regarding the execution of the contract. According to the petitioner, even though the agreement was executed,

because of the early onset of monsoon and other factors attributable to the failure of the officials to complete certain actions on their part for enabling the petitioner to commence the execution of the work, the work could not be performed in time. Even though the petitioner submitted that he has executed the work for a length of 300 meters as trial work and that too in the presence of departmental authorities, the respondents have a different case in their counter affidavit that it is only a false claim and actually the said work was also not satisfactory and it is a case where the petitioner had not made any attempt to start the work. It is seen that correspondences were exchanged between the petitioner and the official respondents and ultimately as per Ext.P10 dated 29.7.2005 the second respondent terminated the contract and ordered re-arrangement of the work at the risk and cost of the petitioner. By the same order, the second respondent by invoking the penal clause in the agreement forfeited to Government the bank guarantee of Rs.10 lakhs and the performance guarantee provided for Rs.24.03 lakhs.

4. Challenging the above proceedings, the petitioner approached this court in Writ Petition No.25304/2005 and by judgment dated 25.8.2005 the writ petition was disposed of. Ext.P12 is the judgment in the above writ petition. This court took the view that the dispute raised in the writ petition is not one which can be effectively adjudicated under Article 226 of the

Constitution of India. Learned single Judge held the following:

> "The petitioner has to move the competent civil court. If the forfeiture is found to be illegal, the petitioner can get back the money with interest from the respondents. Needless to say, if the respondents propose to recover any additional amount from the petitioner and any unilateral action is taken in this regard, the petitioner will be free to move this court again for appropriate reliefs, in the light of the decision of this court in Paily v. State of Kerala (2000 (3) KLT 343)."

Subsequent to the above judgment, the second respondent forwarded Ext.P13 by which the petitioner was informed that the provisional risk and cost amount of the work is assessed as Rs.77,61,699/-. The petitioner was further directed to remit the amount at the earliest. It has also been informed to him that "the final risk and cost amount will be intimated to him in due course." Aggrieved by Ext.P13, the petitioner filed Writ Petition No.27586/2005.

5. In Writ Petition No.10998/2006, the petitioner challenges Ext.P8 by which the name of the petitioner has been removed from the approved list of contractors by the second respondent apparently because of his failure to clear the provisional liability intimated to him as per Ext.P13 in the

earlier writ petition.

6. The main contentions urged by the Shri T.P. Kelu Nambiar, learned Senior counsel appearing for the petitioner is that the action of the second respondent in communicating the provisional liability assessed, evidenced by Ext.P13, is clearly illegal and is against the settled position of law that without quantifying the liability, if any, by a proper adjudication through a competent forum, the respondents could not have imposed the liability straight away on their own assessment. It is urged that the action of the respondents is clearly against the dictum laid down in **V.P. Kunhammed v. State of Kerala** (AIR 1987 SC 1359), **Paily v. State of Kerala** (2000 (3) KLT 343) and similar cases. It is pointed out by the learned Senior counsel that the second respondent being a party to the contract, an adjudication by him consequent on the alleged breach of contract does not stand in the eye of law.

7. Learned Senior counsel further points out that by issuing Ext.P8 which is under challenge in Writ Petition No.10998/2006, the second respondent has exceeded all limits of his authority. It is pointed out that this court as per Ext.P5, had passed an interim order staying recovery of amounts pursuant to Ext.P13, from the petitioner without obtaining a decree from the competent civil court (Writ Petition No.27586/2005). Hence, the

action of the second respondent in blacklisting the contractor amounts to violation of the interim order passed by this court and hence the same should be declared as illegal and arbitrary.

8. On behalf of the respondents, counter affidavits have been filed in both the writ petitions. The tone and tenor of the averments are that there is absolute failure on the part of the petitioner to commence the work and there had not been any inaction on the part of the second respondent or his subordinates in performing their part of the contract to enable the petitioner to complete the work within the time provided in the agreement. It is averred that the allegations raised by the petitioner have no factual support and that it is the petitioner who has committed a breach of contract by not commencing the work even after the period of agreement was over. It is further pointed out that consequent on the termination of the contract, the liability on account of the termination has been provisionally fixed at Rs.77,61,699/- and the petitioner is liable to remit the said amount to the department. It is also averred that the final liability can be ascertained only after awarding the work to another agency and that the same will be intimated to the petitioner thereafter. It is asserted in the counter affidavit that "second respondent has the absolute right to assess the liability on account of the breach of the terms of the contract by the petitioner." As

regards blacklisting of the contractor, the counter affidavit filed in Writ Petition No.10998/2006 points out that the action was preceded by a show cause notice and there is abject failure on the part of the petitioner to furnish a reply within the time limit of 15 days provided in the show cause notice. It is also pointed out that Ext.P7 stated to have been submitted by the petitioner is a fabricated one and no such letter was received by the second respondent. It is also admitted that a reply dated 17.3.2006 sent by the petitioner, produced as Ext.R2(a), has been received by the department.

9. Therefore, the important question that arises is whether the second respondent was right in determining/assessing the amount of liability without moving a competent forum to adjudicate the issue. In fact, the Honourable Supreme Court and this court in various decisions have reiterated more than once that one of the parties to the contract cannot adjudge his own cause and impose a liability thus on the other party to the contract. Here is a case where the petitioner is not admitting the breach of contract and according to him, the termination of the contract was illegal. It is also admitted at the Bar that there is no clause in the agreement providing for arbitration. Hence, normally a civil court alone is the forum to determine whether any damages are due from the petitioner. In such circumstances, one of the parties to the contract could not have assessed the

alleged liability on its own without taking recourse to a civil suit. This question was specifically considered in the decision of this court reported in **Paily v. State of Kerala** (2000 (3) KLT 343). A learned single Judge of this court after analysing the legal position, held that as there is no admission of liability by the party concerned and as he not admitted the breach of contract and the liability, the matter has to be resolved not by one of the parties to the contract but by the properly constituted forum. It was further held that "only after determination of the liability, the damages could be recovered from the petitioner." The learned judge also held that "it is a fundamental rule in the administration of justice that a person cannot be judge in a cause wherein he is interested , i.e. no man can judge his own cause." Recently, a Division Bench of this court in the decision reported in **Shriram Engineering Construction Co. Ltd. v. K.S.I.D.C. and another** (ILR 2007 (1) Ker. 745), has reiterated the legal position further. The Division Bench, after considering the decisions of the Supreme Court, viz. **V.P. Kunhammed v. State of Kerala (**AIR 1987 SC 1359), **Abraham Sebastian v. State of Kerala** (2003) 7 SCC 418) and the decisions of this court reported in **K.A. Sobhanadas v. State of Kerala and another** (1984 KLJ 853) as well as **Mohammed Kunhi v. Executive Engineer** (AIR 2000 Ker. 268), held that disputed amounts not settled or adjudicated, cannot be

recovered by the proceedings under the Revenue Recovery Act. It was held that the respondents therein can realise disputed amount only by adjudication and in the absence of a clause for arbitration, the only remedy available is to file a suit. I respectfully follow the dictum laid down in the above decisions. Therefore, the provisional assessment of the liability attempted by the second respondent as evidenced by Ext.P13, is unsustainable in law.

10. It is also to be seen there was a binding judgment between the parties, viz. Ext.P12 in Writ petition No.27586/2005, wherein the learned single Judge in clear terms had declared that if the respondents propose to recover any additional amount from the petitioner and any unilateral action is taken in this regard, the petitioner will be free to move this court again for appropriate reliefs in the light of the decision of this court in Paily v. State of Kerala (2000 (3) KLT 343). The message was clear but it did not reach the second respondent, obviously. It is also interesting to notice that what is communicated by Ext.P13 is a provisional liability and it is reiterated in the counter affidavit that the second respondent has the absolute right to assess the liability on account of the breach of the terms of the contract by the petitioner. Apparently, the second respondent overlooked the dictum laid down in 2000 (3) KLT 343 in making the said assertion. This is a case

where the second respondent is yet to assess the final liability and intimate it to the petitioner. In Ext.P13 letter the said fact is indicated. When Ext.P12 judgment is inter parties, the same binds the second respondent and he could not have taken the task of either assessing the provisional liability or the final liability. The second respondent was totally wrong in asserting that he is the authority vested with the power to decide the liability and assess the damages. When the petitioner is not admitting the breach of the contract, the second respondent could not have assessed the damages without recourse to the forum of civil court. Hence, Ext.P13 is illegal, arbitrary and it is declared so.

11. As regards Writ Petition No.10998/2006 is concerned, it is seen that the second respondent has taken follow up action pursuant to the intimation of provisional liability against the petitioner. This action of the second respondent is clearly without any application of mind. In Writ Petition No.27586/2005 an interim order was passed on 26.9.2005 staying the recovery of amounts pursuant to Ext.P13 from the petitioner without obtaining a decree from the competent civil court. Therefore, the second respondent could not have taken further action pursuant to Ext.P13 to remove the petitioner from the list of contractors on the alleged plea that he had failed to remit the amount demanded. This is in total violation of the

interim order passed by this court. It is evident from Ext.P6 show cause notice that the action was taken only on the ground that petitioner had failed to remit the amount demanded. When the second respondent is a party to Writ petition No.27586/2005, he was bound by the order of stay granted by this court and could not have ignored it and proceeded further without seeking modification of the interim order. The stand taken in the counter affidavit therefore that the petitioner failed to reply to the show cause notice and hence the second respondent was right in issuing the proceedings by way of Ext.P8 dated 14.3.2006, is not correct. The only reason stated in Ext.P8 is that the petitioner has not remitted the amount so far (provisional liability of Rs.77,61,699/-. It is only a dependent order. Hence, I am of the view that Ext.P8 has been passed arbitrarily and it is liable to be set aside.

12. Accordingly, Ext.P13 in Writ petition No.27586/2005 and Ext.P8 in Writ Petition No.10998/2006 are quashed. It is declared that without having an adjudication of the dispute by a competent forum and assessment of damages, the second respondent cannot unilaterally seek recovery of amounts from the petitioner.

The writ petitions are allowed to the above extent. This is without prejudice to the rights of the respondents to have recourse to other proceedings. I have not expressed any opinion regarding the merits of the

claim put forward by the respondents.

(T.R. Ramachandran Nair, Judge.)

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